Office-Supreme Court, U.S.
FILED
JUL 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1666

IN THE

# Supreme Court of the United States

October Term, 1980

JOHN R. LARSON, Commissioner of Securities, Minnesota Department of Commerce; WARREN SPANNAUS, Minnesota Attorney General; Individually and in their official capacities,

*Appellants,*

vs.

PAMELA VALENTE, LARRY BARBER, LARRY HAFT, KIMBERLY KORMAN, and HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY,

*Appellees.*

## BRIEF FOR APPELLANTS

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224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

## QUESTIONS PRESENTED

1. Whether the court below erred in assuming that a statutory provision intentionally and impermissibly favored certain religious sects over others when there was no evidence of legislative intent supporting this conclusion and no evidence of religious favoritism resulting from the provision.

2. Whether a statute regulating charitable contributions which requires a religious charitable organization to comply with registration and financial reporting requirements if it solicits more than half of its funds from the general public is an establishment of religion.

3. Whether the court below erred in expanding the "overbreadth doctrine" to an establishment clause challenge and in dispensing with the requirement that plaintiffs be injured by the application of the law in question when there has not been a finding that they are or represent a religious organization.

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## BRIEF FOR APPELLANTS

## PARTIES IN PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

There has not been any change in the parties participating in this case since the issuance of the Opinion of the United States Court of Appeals for the Eighth Circuit.

## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit is reported at 637 F.2d 562 (8th Cir. 1981). The text of this Opinion is set forth in the Joint Appendix hereto. J.A. 130. The order of the District Court for the District of Minnesota granting summary judgment is not reported. That order incorporates by reference portions of the unreported order of the district court granting plaintiffs' motion for a preliminary injunction. The text of these orders is set forth in appellants' Jurisdictional Statement, Appendices B1, and C1 respectively. The orders of the district court adopted the reports and recommendations of the federal magistrate to whom the preliminary injunction and summary judgment motions were referred. The reports and recommendations of the magistrate are set forth in Appendices B2, and C2 respectively.

## JURISDICTION

This action was initiated by plaintiffs-appellees (hereinafter "plaintiffs") in the United States District Court for the District of Minnesota pursuant to 42 U.S.C. § 1983. Plaintiffs sought a declaration that the Minnesota Charitable Solicitations Act, Minn. Stat. §§ 309.50-309.61 (1980) was unconstitutional as violative of the First and Fourteenth Amendments and sought an injunction against its enforcement. J.A. 2.

The Order appealed to the Eighth Circuit followed plaintiffs' motion for summary judgment on the merits and the cross motion of defendants for partial summary judgment that two challenged provisions of the Act did not present justiciable issues. On January 19, 1980, the district court granted in part and denied in part plaintiffs' and defendants' motions. Defendants appealed and plaintiffs cross appealed. On January 7,

1981, the United States Court of Appeals for the Eighth Circuit issued an opinion holding a single provision of the Act unconstitutional and modifying and limiting the decision of the district court. A Notice of Appeal to this Court was filed on March 23, 1981, with the Eighth Circuit Court of Appeals. The jurisdiction of this Court to review the decision of the court of appeals is conferred by 28 U.S.C. § 1254(2).

## LAW AND CONSTITUTIONAL PROVISIONS IN QUESTION

The Minnesota Charitable Solicitations Act, Minn. Stat. §§ 309.50-309.61 (1980) ("Act") is a comprehensive legislative enactment concerning solicitation of funds for charitable purposes in the State of Minnesota. Among its provisions are those requiring charitable organizations to identify themselves by filing a registration statement with the State of Minnesota (Minn. Stat. § 309.52) and to provide annual financial information about their operations (Minn. Stat. § 309.53). (Together, these two provisions are referred to hereinafter as the "disclosure provisions".)

The subdivision of the Act declared unconstitutional by the court below is one of six subdivisions exempting certain classes of organizations from the disclosure provisions in the Act. This subdivision, Minn. Stat. § 309.515, subdivision 1(b), provides:

> Subject to the provisions of subdivisions 2 and 3, sections 309.52 [registration] and 309.53 [annual reporting] shall not apply to any of the following:
>
> . . .
>
> (b) A religious society or organization which received more than half of the contributions it received in the accounting year last ended (1) from persons who

are members of the organization; or (2) from a parent organization or affiliated organization; or (3) from a combination of the sources listed in clauses (1) and (2). A religious society or organization which solicits from its religious affiliates who are qualified under this subdivision and who are represented in a body or convention is exempt from the requirements of sections 309.52 and 309.53. The term "member" shall not include those persons who are granted a membership upon making a contribution as a result of a solicitation.

The United States Court of Appeals for the Eighth Circuit held Minn. Stat. § 309.515 (1)(b) to be violative of the establishment clause of the first amendment to the United States Constitution, which provides: "Congress shall make no law respecting an establishment of religion . . . ."

The first amendment applies to the states by virtue of the fourteenth amendment to the United States Constitution.

## STATEMENT OF THE CASE

This litigation concerns Minnesota's Charitable Solicitation Act (Minnesota Statutes, §§ 309.50-309.61 (1980)) ("Act") relating to the solicitation of funds from Minnesota citizens for charitable purposes. The objectives of the Act are to provide information to Minnesota citizens for the purpose of making them more informed charitable donors and to protect them from fraud and misrepresentation. Essential to Minnesota's statutory scheme is a system of registration and financial disclosure by those individuals and organizations soliciting contributions in the state.

Incorporated into Minnesota's statutory scheme are legislative determinations of when financial disclosure is not neces-

sary to effectuate the purposes of Minnesota's law. These legislative determinations are expressed in a series of six exemptions from the disclosure provisions. One of the six exemptions, the exemption pertaining to those religious organizations and societies which solicit the majority of their funds from their membership or from affiliated organizations, is the sole provision before this Court on appeal.

The district court, without benefit of a factual record, determined that this exemption impermissibly distinguished religious organizations. The court held that the exemption constituted a *per se* violation of the "primary effect" prong of the three-part establishment clause test recited in modern establishment clause decisions of this Court.[1] Because of this purported defect, the court declared the entire Act unconstitutional as to religious organizations.[2]

The United States Court of Appeals for the Eighth Circuit affirmed the ruling of the district court on the exemption

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[1] The district court relied on the test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971): "Every analysis in this area must begin with consideration of the cumulative criteria developed by the court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither enhances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243, 88 S.Ct. 1923, 1926 (1968); finally, the statute must not foster "an excessive governmental entanglement with religion" Walz [v. Tax Commission, 397 U.S. 664, 674, 90 S.Ct. 1409, 1414 (1970)]." Jurisdictional Statement A-62.

[2] Plaintiffs challenged the Act on a broad range of constitutional theories summarized in paragraph 8 of their Complaint. These allegations are that the provisions of the Act,

> . . . on their face, substantively and procedurally abridge the exercise of freedom of speech, press, and religion; arbitrarily deprive persons of their liberty and property without due process of law; capriciously deny the equal protection of the laws; and are vague, ambiguous, and overbroad, all in violation of the First and Fourteenth Amendments of the United States Constitution.

J.A. 5. Of these theories, the establishment of religion theory was the sole basis for the determination of unconstitutionality on summary judgment. J.A. 145.

question. First, the court allowed plaintiffs to attack the exemption on establishment clause grounds, although the court expressly noted that plaintiffs had not demonstrated that they were a religious organization adversely affected by the challenged exemption. J.A. 145-46. On the merits of the establishment clause issue, the circuit court, also without benefit of a factual record, assumed the exemption was motivated by an unconstitutional legislative intention to shelter certain (unspecified) religious denominations from the operation of Minnesota's disclosure provisions. The exemption provision was therefore found to constitute a "religious gerrymander." Based on these assumptions, the Eighth Circuit found the exemption provision violated the "secular purpose" prong of the three-part test. J.A. 140.

As a secondary holding, the court found the exemption provision violative of the "primary effect" stricture because it differentiated between religious organizations for reasons not supported by a "compelling" secular justification. J.A. 143. Thus, the exemption provision was declared unconstitutional. J.A. 143. The remedy ordered was to broaden the exemption to encompass all religious organizations and societies. The matter was remanded to the district court to determine whether plaintiffs were a religious organization and thereby entitled to the benefit of the exemption ruling. J.A. 145-46.

### A. The Charitable Solicitation Law.

Minnesota's Charitable Solicitation Law, codified as Minn. Stat. §§ 309.50-309.61 (1980), is reproduced in full in the Jurisdictional Statement, A-70. The law was originally enacted in 1961 (as Minn. Laws 1961, ch. 309). The dis-

closure requirements, and exemptions thereto, have remained relatively unchanged since the original enactment.[3]

Minnesota's Act is applicable to any person or organization soliciting contributions for a charitable purpose. "Charitable purpose" is defined in the Act to mean "any charitable, benevolent, philanthropic, patriotic, religious, social service, welfare, educational, eleemosynary, cultural, artistic, or public interest purpose, either actual or purported."[4] Minn. Stat. § 309.50, subd. 3 (1980). The Act operates to protect Minnesota citizens from fraud and attempts to make Minnesota charitable contributors better informed about the charitable organizations which seek their contributions.

In 1978, comprehensive legislation was enacted amending 29 different sections of various Minnesota laws relating to charitable solicitation, charitable trusts, and probate proceedings involving charitable bequests. The exemption provision in question in this litigation was one section of the 1978 legislation. *See* Minn. Laws 1978, ch. 601, § 5.[5]

The disclosure provisions require initial identification of charitable organizations soliciting contributions, Minn. Stat. § 309.52, and routine disclosure of financial information from

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[3] As the court below noted, the Act has not been interpreted by Minnesota's Supreme Court. J.A. 133, n. 3. Also, no implementing rules have been promulgated under the Act, although rulemaking authority is provided. Minn. Stat. § 309.591 (1980).

[4] Minnesota's statutory definition is consistent with the common law definition of "charitable purposes" as including "religious purposes." *See Restatement (Second) of Trusts*, §§ 368, 371 (1959). Charitable contributions have been estimated to exceed $60 billion annually in the United States, of which more than half are made to religious organizations. *See generally*, C. Bakal, *Charity U.S.A.* 9-10, 85-87 (1979).

[5] Between 1961 and 1978, registration and financial reporting was required of religious organizations except "[a]ny group or association serving a bona fide religious purpose when the solicitation is connected with such a religious purpose . . . ." See Minn. Stat. § 309.515 (1976).

charitable organizations annually, Minn. Stat. § 309.53. The information required to be disclosed is set out by statute in both the registration statement section and the annual report section. The Commissioner of Securities may, "by rule or order," require that additional information be supplied. Minn. Stat. § 309.52, subd. 1(p). "Rule" under Minnesota law refers to a statement of general application and can be promulgated only after following the rigorous requirements of Minnesota's Administrative Procedure Act[6] including formal hearings. Minn. Stat. § 15.0411, subd. 3 (1980). "Order" under Minnesota law refers to an action of application to a specific organization which can be undertaken only after notice and formal hearing under the Administrative Procedure Act. Minn. Stat. § 15.-0411, subd. 4 (1980).

The specific financial information which is to be disclosed and the extent of detail required are established by objective criteria. The annual report provision, Minn. Stat. § 309.53, as well as certain definitional sections of the law, specify that the financial information be presented in accordance with "generally accepted accounting principles". Certain information which may be believed especially sensitive by charitable organizations and which is not required to be disclosed by

[6] Minn. Stat. §§ 15.0411-15.052. All rule hearings and contested case hearings in Minnesota are conducted by an independent hearing examiner employed by the Minnesota Office of Administrative Hearings. The hearing examiner's recommendation to the Commissioner is not binding on the Commissioner, but the Commissioner's decision must be made on the basis of the formal record of the hearing, and must be supported by substantial evidence in the record. Minn. Stat. §§ 15.0412, subd. 4(c); 15.0419; 15.0422. Judicial review of rules and orders following contested cases is specifically provided for under Minnesota law. *See* Minn. Stat. §§ 15.0416 and 15.0424 (1980). Additional procedural requirements are specified by administrative rules. *See* 9 *Minnesota Code Administrative Rules* §§ 2.101-2.222.

generally accepted accounting principles (e.g., identification of contributors, or the organization's members or employees)[7] cannot be required by state officials to be publicly disclosed as part of the disclosure process. The information required is thus prepared and made available to the contributing public by the organization itself based solely upon objective criteria.[8]

**B. The Exemption Provisions.**

The Minnesota legislature has specified those situations in which disclosure is not necessary or not appropriate to further the legislative purposes of preventing fraud and improving donor awareness. This specification of circumstances is contained in the form of six exemption provisions from the disclosure provisions of the Act. Minn. Stat. § 309.515. The exemptions are summarized as follows:

a. Organizations which receive less than $10,000 annually and employ no paid staff;

b. Religious organizations which raise more than half of their contributions from their membership or from affiliated organizations;

c. Organizations subject to the supervision of the Minnesota college system or to national accrediting organizations;

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[7] Identification of "officers, directors, trustees and [the] chief executive officer" is required by Minn. Stat. § 309.52, subd. 1(f) (1980).

[8] An organization soliciting more than $50,000 annually is required to receive in its annual report a statement by a certified public accountant that the information filed "fairly represents the activities of the organization in sufficient detail to permit public evaluation of its operations." Minn. Stat. § 309.53, subd. 3(g) *as amended by* Minn. Laws 1981, ch. 148, § 1 (increasing dollar amount from $25,000 to $50,000).

d. Fraternal, patriotic, social, educational, alumni, professional, trade or learned societies which raise 100 percent of their contributions from their membership;

e. Charitable organizations soliciting contributions for specified individuals and which pass through 100 percent of their contributions raised to those individuals; and

f. Private foundations limiting solicitation to fewer than 100 members of the public.

A number of these exemption provisions are based on the determination that the amount of solicitation is not sufficient to justify the disclosure requirement. The provisions "a" (under $10,000) and "e" (all donations passed through to named individuals) are of this type.

The remaining exemptions are based upon a different principle: the information which would be required to be disclosed is already available to the *persons from whom contributions are sought.* Thus, with respect to contributions sought from the general public by educational institutions, the Act's disclosure provisions would, if applied to such organizations, be duplicative of the existing public disclosure requirements which are part of state supervision and national accreditation of educational institutions (exemption "c"). Similarly, private foundations (exemption "f") are subject to general public disclosure requirements imposed by federal tax law.

The membership based exemptions are in accordance with this principle, since organizations soliciting exclusively or primarily from their members, rather than from the general public, routinely provide financial information to the *persons from whom contributions are sought.* Exemptions "b" (religious organizations) and "d" (fraternal, patriotic, etc.), are

grounded on this premise and distinguish between "member-donors" and "public donors." Members are considered more aware of the activities and uses of funds by the organizations of which they are members. Moreover, members of non-public corporations in Minnesota have a statutory right to inspect books and records of their organizations. This is explicitly provided by Minnesota's Non-Profit Corporation Act. Minn. Stat. § 317.28 (1980). The circuit court accepted the rationale of the member-donor, public-donor distinction as reasonable. J.A. 138.

Nothing in the exemptions themselves, including the exemption found unconstitutional by the court below, refers to or relies upon matters of dogma, religious belief, or any other factor intrinsically religious. Nor is the criterion in the religious exemption so unique as to give rise to the suspicion that it is actually a religious based differentiation in another form. The same criterion applies to fraternal, patriotic, and professional organizations (exemption d), and has been in effect in Minnesota law since the origin of the charitable solicitation law in 1961.[9]

The religious organization exemption in subdivision b is not the only exemption available to religious organizations. The Act's other exemptions apply to all "charitable organizations," including religious ones, and a religious organization not exempt under the terms of exemption "b" may qualify for exemption under any of the other provisions. For example, a religious organization which raises the majority of its funds publicly (not exempt under "b") may still be exempt under subdivision "a" if it raises less than $10,000 annually and has no paid staff employees. Conversely, an otherwise exempt

[9] *See* Minn. Laws 1961, ch. 309, § 2.

religious organization becomes subject to the disclosure provisions in any year in which it employs a professional, paid fund raiser. Minn. Stat. § 309.515, subd. 2. All provisions of the Act, other than the disclosure provisions, apply to all religious charitable organizations.

## SUMMARY OF ARGUMENT

Minnesota's Charitable Solicitation Act pertains to all solicitation of funds for charitable purposes in Minnesota. Its objectives are to increase donor awareness about the organizations soliciting contributions and to prevent fraudulent and misleading solicitations. These are legitimate and significant governmental objectives. The provisions of this Act include the requirement to identify the organization and report on the general disposition of funds raised for charitable purposes. Certain classes of organizations whose solicitation activity is relatively limited or which solicit funds from persons with access to financial information are exempted from these identification and reporting requirements. One exempted class is "religious organizations and societies" which solicit most of their funds from members and affiliated organizations. This exemption provision was found by the courts below to be a law respecting an establishment of religion, and therefore proscribed by the first and fourteenth amendments.

The appellate court based its order on its speculation that the exemption was enacted pursuant to improper motive by the Minnesota legislature to favor certain sects or religions. The court erred in so holding. The district court had taken no evidence on legislative motive nor had it intimated any opinion on the question. Motive was not briefed or argued by the parties at any stage in the proceedings. Judicial examination of legislative motive in constitutional adjudication should not

be undertaken lightly and cannot be based on mere judicial suspicion and guesswork.

The exemption provision does not operate to separate religious organizations along any line of religious denomination, sect, dogma, or belief. The criterion that separates an organization's public solicitation is secular in its operation and is neutral in religious matters. The only evidence on the effect of the criterion demonstrates that the non-exempt organizations include those identified with major denominations, and thus "well-established" religious organizations are not necessarily exempted. The secular criterion in Minnesota's law does not differentiate among religious organizations by any factor other than public solicitation. It does not contain any religious component; it is not a law relating to religion.

When an intentional or effective religious discrimination is alleged, the party making the allegation must bring forward evidence supporting the allegation. None has been brought forward in this case. Absent such evidence, a law which affects religious organizations unequally does not violate the establishment clause if the unequal effect results from application of secular criteria. The establishment clause does not require that all religious organizations be identically affected by secular legislation; the extensive variance in the activities of religious organizations negates any possibility that they could be. Given that inevitability, the mere fact that religious organizations are unequally affected does not offend the establishment clause.

The secular criterion behind the challenged exemption is that disclosure need not be required when the majority of the organization's funds are contributed by member-donors. This criterion is reasonably related to the overall objectives of Minnesota's law. The criterion was acknowledged by the court be-

low to be reasonable when applied to non-religious organizations soliciting funds. The same factors justify its application to religious organizations soliciting funds. The establishment clause does not require a religious exemption from every program of state regulation which may affect religious organizations.

Plaintiffs here have shown no injury by application of the exemption provision. The record does not show whether they would receive the benefit of the exemption as enacted or whether the entire provision is irrelevant to their circumstances. Since they are not injured by the law, they lack standing to challenge it. The overbreadth doctrine relied upon by the court below is not applicable to establishment clause challenges. In any event, the overbreadth doctrine is not a substitute for injury in fact.

## ARGUMENT

### I. THE COURT BELOW IMPROPERLY HELD THE EXEMPTION PROVISION UNCONSTITUTIONAL BASED EXCLUSIVELY UPON ITS OWN UNWARRANTED ASSUMPTIONS CONCERNING LEGISLATIVE MOTIVE AND EFFECT.

#### A. The Court's Conclusions About Legislative Motive Are Wholly Unwarranted.

The Eighth Circuit Court of Appeals' Opinion is remarkable for the extent to which it relies upon its own speculation in deciding that the law in question was the result of intentional and invidious discrimination by the Minnesota legislature. The court almost appears to envision specific conversations by specific individuals concerning specific religious organizations. At some places, the court's description of what went on in the Minnesota legislature lacks only names and dates:

> The statutory discrimination between such organizations smacks of "religious gerrymandering," [footnote omitted] an apparently intentional favoritism for the religious organizations obtaining some but less than half of their funds from the public. As further discussed, it may be inferred that the draftsmen of this legislation wished to reduce the burden otherwise posed on well-established churches . . . .

J.A. 135-36. Such assumptions pervade the court's opinion. At one point, for example, the court speculated that the exemption "appears to be designed to shield favored sects, while continuing to burden other sects". J.A. 138-39. At another point the court concluded that "it seems much more likely that at some stage of the legislative process special solicitude for particular

religious organizations affected the choice of statutory language. The resulting discrimination is constitutionally invidious." J.A. 140.[10]

The court could not name specific legislators or identify the "favored sects" because it had before it not a shred of evidence concerning the legislative process. Legislative motive was never raised as an issue before the district court and that court made no findings on that issue. In fact, the district court had before it no evidence on which such a finding could have been based. On appeal to the Eighth Circuit, legislative motive was not an issue raised by either party, the plaintiffs-appellees urging the court to affirm on primary effect grounds. Thus, the matter of what the Minnesota legislature attempted to do in enacting this exemption as part of a comprehensive revision to Minnesota's laws concerning charitable organizations was a matter raised on the court's own motion and decided on the court's own speculations concerning events and individuals completely unknown to it.[11]

Even in those cases where evidence of legislative intent is available to the courts, the evidence must be used with great care in constitutional adjudication. As this Court stated in *United States v. O'Brien*, 391 U.S. 367, 383 (1968), "Inquiries into congressional motives or purposes are a hazardous matter." Included in the recognized hazards of constitutional de-

[10] Even on the question of the appropriate remedy for the constitutionally invidious legislation, the court chose between striking the exemption provision and thereby including all religious organizations in the disclosure requirements (unless exempt under one of the remaining exemptions) and broadening the exemption to apply to all religious organizations. The court chose the latter course which it justified based on "probable legislative intent". J.A. 144.

[11] In their Motion to Affirm filed with this Court, plaintiffs have abandoned the appellate court's opinion on "secular purpose," asking for affirmance on "primary effect" grounds. *See* Motion to Affirm at 12.

terminations based upon perceived legislative motivation is the hazard that the court's inquiry necessarily requires speculation even when direct evidence of legislative motivation is before the court.[12] Where the court has before it no direct evidence of legislative motive, as here, and relies instead on inference and assumption, and where the court's dispositive conclusions are prefaced by " it seems much more likely that . . .", J.A. 140, the error of the motivational inquiry is further compounded.

Different considerations do not pertain in establishment clause analysis. Forays into legislative motivation are circumscribed by this Court's recognition of a strong presumption of constitutional motivation. *See e.g., Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). The presumption was not rebutted in the record nor, given the lack of factual basis,[13] did plaintiffs even attempt to rebut the presumption. The court below erred in doing so on its own motion and without factual basis.

### B. The Court's Conclusions Concerning The Religious Denominations Affected By The Exemption Provision Are Totally Unfounded.

As it did on the question of legislative motivation, the court below substituted its own speculation for the required "demonstration" on the question of the effect of the law in question

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[12] "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it and the stakes are sufficiently high for us to eschew guess work." United States v. O'Brien, 391 U.S. at 384. *See generally*, Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205 (1970).

[13] Had plaintiffs put into issue the question of motivation, defendants could have shown that shielding favored religions was not a concern expressed in the legislative hearings. See Jurisdictional Statement at 12-13.

on various religious organizations. On this point, the court below interpreted the exemption provision to have effectively (and for constitutional analysis purposes, intentionally) drawn a line between "well-established" religious organizations on the one side and "new" religious organizations on the other. J.A. 136. Even if these terms were defined somewhere in the opinion, this conclusion of the court would be completely without foundation. In reaching this conclusion the court appeared to merely accept plaintiffs' characterization of itself as a new religious organization and to infer therefrom that all organizations sharing that characteristic fall (according to a legislative plan) on the unexempt side of the line drawn by the Minnesota legislature. This reasoning is faulty and is not an adequate substitution for a factual analysis.

The only evidence in the record which bears on this question clearly establishes that the court's speculations were not founded in fact. This evidence enumerates the charitable organizations which had registered under the Act as of August 10, 1979.[14] Included in the list of registered organizations are a number of religiously affiliated organizations, many of which are associated with what are presumably "well-established" religious denominations, as the appellate court used that term.[15] These religious organizations do not resemble in any respect the organizations which both

[14] Affidavit of Susan E. Fortney dated August 10, 1979. J.A. 19.

[15] For example: Brother DePaul Charity Foundation, Catholic Athletic Association, Catholic Welfare Service of Minneapolis, Campus Crusade for Christ, Christian Children's Fund, Inc., Episcopal Lay Discipleship, International Assembly of Christians, Jewish Community Center of St. Paul, Jewish Vocational Services, Little Sisters of the Poor-Minneapolis, Minneapolis League of Catholic Women, Inc., St. Paul Area Young Men's Christian Association (YMCA), Sacramental Encounter of Spokane, Salvation Army-Minneapolis, United Jewish Fund, Vietnamese Buddist Association, YWCA of Winona.

courts below found to be systematically and purposefully subject to the disclosure provisions[16]—i.e., organizations which are new or which are not "well-established."[17]

Had plaintiffs been required to present factual evidence specifying the class of religious organizations which are subject to the disclosure provisions the class would have shared only one characteristic. That characteristic is the one on the face of the legislation: The fact that the majority of contributions are raised by the exempt religious organizations from their members and from their affiliates. There is no other differentiating criterion. There is no distinction based upon religious dogma, popularity, length of time in existence, or any other factor which could be considered evidence material to a demonstration of religious gerrymandering by the Minnesota legislature.

It was error for the court to assume that some sectarian factor existed in this law through which Minnesota had constructed a religious gerrymander. The burden of demonstrating a religious gerrymander is on the party alleging it. *Gillette* v. *United States*, 401 U.S. 437 (1971).

Moreover, since this case was decided pursuant to plaintiffs' motion for summary judgment, any disputed factual issues of motive and effect should have been resolved against, and not for, plaintiffs. *Adickes v. Kress & Co.*, 398 U.S. 144 (1970). Finally, the legislation should have been presumed constitu-

[16] As far as defendants are aware, such non-"well established" and controversial organizations as the Church of Scientology and People's Temple are exempt under the statute.

[17] Both courts below substituted "churches" (without definition) for the statutory term "religious organizations and societ[ies]" throughout their opinions, thereby suggesting they did not understand the mechanics of the exemption provision. Even if a "church" of a particular denomination is exempt, its related organizations are not exempt unless they independently qualify for exemption.

tional. It cannot be held unconstitutional as violative of the establishment clause without factual determinations sufficient to defeat the constitutional presumption. *Board of Education v. Allen*, 392 U.S. 236, 244-45 (1968); *Gillette v. United States*, 401 U.S. 437 (1971). There is simply no basis in either summary judgment procedure or establishment clause analysis for the presumptions of unconstitutionality developed by the circuit court.

## II. THE CHALLENGED EXEMPTION IS CONSTITUTIONAL UNDER THE ESTABLISHMENT CLAUSE.

### A. The Establishment Clause Does Not Require That Secular Legislation Affect All Religious Organizations Identically.

This case again brings before the Court the question of whether the state can ever, consistent with the establishment clause, enact a law based upon secular criteria which may not identically affect all religious organizations. Plaintiffs argued, and the courts below ruled, that disparate impact is *per se* unconstitutional. The only case of this Court to directly reach this issue, *Gillette v. United States*, 401 U.S. 437 (1971), clearly contradicts this proposition.

Plaintiffs in *Gillette* sought a determination that the Military Selective Service Act of 1967, 50 U.S.C. § 456 (j) violated the establishment clause because it allowed exemptions from military service to persons whose religious beliefs included objections to all wars but did not exempt those whose beliefs included objection only to particular wars. Plaintiffs argued that this law operated as a preference for some religious organizations and their members over others, precisely the

point argued by plaintiffs here and relied upon by both courts below.

This Court in *Gillette* held that disparate treatment alone was not a sufficient basis to render the law void on establishment clause grounds. As this Court noted:

> The critical weakness of petitioners' establishment claim rises from the fact that § 6(j), on its face, simply does not discriminate on a basis of religious affiliation or religious belief, apart of course from beliefs concerning war.

401 U.S. at 450. Thus, the establishment clause does not mandate application of a *per se* rule against all regulation which differently affects religious organizations. Such disparate results, which are inevitable when religious organizations act in areas of legitimate state interest, are permissible if the challenged regulation has a neutral and secular basis.

In *Gillette* this Court also reached the argument made here that the exemption provision, even if facially secular and neutral to religion, nonetheless might constitute a religious gerrymander. With respect to that point the *Gillette* Court stated:

> Of course, this contention of *de facto* religious discrimination, rendering § 6(j) fatally under-inclusive, cannot simply be brushed aside. The question of governmental neutrality is not concluded by the observation that § 6(j) on its face makes no discrimination between religions, for the Establishment Clause forbids subtle departures from neutrality, "religious gerrymanders," as well as obvious abuses. Still a claimant alleging "gerrymander" must be able to show the absence of a neutral, secular basis for the lines government has drawn.

401 U.S. at 452. The plaintiffs in *Gillette* were held not to have met that burden.

The criterion used in the law in question here, the percent of public contributions, is secular on its face, and is secular in its application to religious organizations. There is no nexus between religious belief and dogma on the one hand and fund raising practices on the other. Fund raising practices are not inviolate; they vary among religious denominations with no discernable pattern, and they vary even with respect to different religious organizations within a single denomination.

In *Gillette* as in the case before the Court, the neutrality mandated by the establishment clause is neutrality in matters of religious affiliation and belief. As long as the purpose of the legislation in question is not to discriminate along the lines of religious affiliation, tenet, or belief, and the distinction made by the statute does not separate religious organizations along those lines, there is no establishment clause violation. This *Gillette* analysis is the same as that used by the Court in *Board of Education v. Allen*, 392 U.S. 236 (1968), in overturning a summary judgment declaration of an establishment clause violation:

> The express purpose of § 701 was stated by the New York legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose.

392 U.S. at 243.

The court of appeals distinguished *Gillette* based on the court's finding of impermissible legislative motivation. J.A.

140. That finding by the circuit court was inappropriate and wholly unwarranted. *See*, Argument I.A. *supra*. The court also attempted to distinguish *Gillette* on the ground that the exemption in the Military Selective Service Act was based upon "compelling secular justifications." J.A. 143.[18] The compelling secular justification in *Gillette* was pertinent only to the free exercise claim adjudicated therein, and there is no free exercise claim before this Court. On the establishment clause analysis, *Gillette* is the controlling precedent.

The analysis made by the court in *Gillette* is not a separate analysis from the "secular purpose," "primary effect" test used in establishment clause cases both before and after *Gillette*. The *Gillette* Court made a specific finding that both of those tests were satisfied. 401 U.S. at 450. The singular importance of *Gillette* to this case is its clear holding that a secular law's unequal impact is not a *per se* establishment clause violation.

Aside from *Gillette*, a large number of state legislative programs have been held not to violate the establishment clause despite their acknowledged differing effects on religious organizations. For example, in *McGowan v. Maryland*, 366

[18] The appellate court's use of a "compelling secular justification" test in an establishment clause context is not part of the *Lemon v. Kurtzman* test and appears to involve equal protection rather than establishment clause considerations. Notably, however, the standard that unequal effects must be justified by a "compelling secular justification", J.A. 143, has been specifically disapproved in equal protection decisions even where racial discrimination has been alleged. *See* Washington v. Davis, 426 U.S. 229 (1976):

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

426 U.S. at 249 (footnote omitted).

U.S. 420 (1961), that state's Sunday closing laws were attacked as unconstitutional establishments of religion. The fact that different religious groups were affected unequally was not disputed. Nonetheless, the Court found no constitutional defect. Disparate impact on religious organizations was not held inconsistent with either the "secular purpose" test or the "primary effect" test.

Both courts below based their formulations of a *per se* "primary effect" rule on dicta from *Everson v. Board of Education*, 330 U.S. 1, 15, 18 (1947) J.A. 134-35; Jurisdictional Statement A-62. This misinterprets *Everson*. *Everson* does not suggest that a secular based law cannot have disparate effects on the activities of religious organizations. This realization is crucial to proper application of the establishment clause, since secular government legislation inevitably affects religious organizations in their secular activities. As this Court has noted:

> A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our state and federal governments impose certain burdens upon and impart certain benefits to virtually all our activities and religious activity is not an exception. The Court is enforced to scrupulous neutrality by the state, as among religions, and also as between religions and other activities, but hermetic separation of the two is an impossibility. It is never required.

*Roemer v. Maryland Public Works Board*, 426 U.S. 736, 745-46 (1976).

Given the limitless variety of activities of religious organizations, the fact that secular legislation will necessarily affect

some religious organizations more than others cannot be denied, nor can an unrealistic demand for identical effects be imposed. A religious organization which operates a college,[19] builds a church,[20] operates a radio station,[21] sells securities,[22] or owns real estate for charitable purposes[23] will undoubtedly be more affected by legislation in these areas than those that do not. There is no constitutional infirmity in this result. Even in *Everson v. Board of Education*, the challenged statute aided only those religious organizations which operated sectarian schools. Nonetheless, the law was found constitutional. The unequal effect on religious organizations was not the relevant issue.

No *per se* rule based on *Everson* has emerged in the subsequent establishment clause decisions of this Court relating to aid to parochial education. *See, e.g., Committee for Public Education v. Regan*, 444 U.S. 646 (1980); *Wolman v. Walter*, 433 U.S. 229 (1977). Rather, the Court has engaged in exhaustive case-by-case examinations of the details of the aid pro-

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[19] *See, e.g.*, Tilton v. Richardson, 403 U.S. 672 (1971); E.E.O.C. v. Mississippi College, 626 F.2d 477 (5th Cir. 1980) *cert. denied*, 49 U.S.L.W. 3969 (June 30, 1981).

[20] *See, e.g.*, Latter Day Saints v. City of Porterville, 90 Cal.App. 2d 656, 202 P.2d 823 (1949) *cert. dismissed*, 388 U.S. 805 (1950) (municipal zoning authority).

[21] *See, e.g.*, King's Garden, Inc. v. F.C.C., 498 F.2d 51 (D.C. Cir. 1974); Christian Echoes, National Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972) *cert denied*, 414 U.S. 864 (1973).

[22] *See, e.g.*, Securities & Exchange Comm'n. v. World Radio Mission, Inc., 544 F.2d 535 (1st Cir. 1976).

[23] Walz v. Tax Commission, 397 U.S. 664 (1970).

grams to determine whether the aid to religious organizations operating schools was in fact an aid to religion itself.[24]

The parochial aid cases do not hold that state contact with religious organizations in their secular affairs is a *per se* violation of the establishment clause. No case in this line even remotely suggests that the state must tailor secular legislation to identically affect all religious organizations.

The courts below erred in finding an "identical effects" requirement implicit in *Everson* and in the "primary effect" prong of the establishment clause standard. Considering the variety of secular activities of religious organizations, legitimately secular legislation will necessarily affect religious organizations unequally. This does not violate the establishment clause. *Everson* is not authority to the contrary.

*McGowan v. Maryland*, 366 U.S. 420 (1961), and the *Everson* line of aid to schools decisions, properly construed, implicitly hold that disparate impact among religious organizations is constitutionally permissible when such distinctions result from application of secular criteria. *Gillette v. United States*, 401 U.S. 437 (1971), so holds explicitly. The challenged provision here meets this standard and is therefore constitutionally proper.

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[24] The distinction in aid to schools cases between secular programs that aid religious organizations operating schools and those that aid religion itself was noted in *Everson*:

> Similarly, parents might be reluctant to permit their children to attend schools which the state cut off from such general governmental services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from the services, *so separate and so indisputably marked off from the religious function*, would make it far more dififcult for the schools to operate. But such is obviously not the purpose of the First Amendment.

330 U.S. at 17-18 (emphasis added).

### B. The Challenged Exemption Is Based Upon Secular And Accepted Principles Of Charities Regulation And Is Therefore Constitutional.

The state has a significant interest in protecting its citizens from abusive practices in the solicitation of funds for charity. *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620 (1980). The same interest pertains when the solicitor is a religious organization. *Heffron v. International Society for Krishna Consciousness, Inc.*, 49 U.S.L.W. 4762 (June 22, 1981); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The circuit court recognized that the Act furthered the state's legitimate interest in charitable solicitation. J.A. 137-38. For this reason the court's apparent hostility toward the challenged exemption provision is not easily understood. First, the majority of the Act makes no distinction among religious and non-religious charitable organizations.[25]

Second, even where the effect on religious organizations is not identical, the differentiating factor is an accepted principle of charities regulation, the member-donor/public-donor distinction. This principle distinguishes funds received form public sources and funds received from membership sources. The circuit court recognized that the member-donor/public-donor distinction serves a legitimate and commendable purpose. J.A. 134, 138.

This distinction is not unique to the religious exemption; it also controls the exemption for fraternal, benevolent and professional societies. *See*, Minn. Stat. § 309.515 subd. 1(d). The criterion was included in Minnesota's original statute on

[25] The religious organization exemption found unconstitutional in Heritage Village Church and Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980), a case heavily relied upon by the court below, J.A. 136, 142-43, was an exemption from the entire North Carolina solicitation act, not merely from the disclosure provisions thereof.

this question. *See*, Minn. Laws 1961, ch. 309, § 2. Thus, the criterion should not generate suspicion on the grounds of uniqueness or on the notion that it was devised solely to effect a gerrymander.

Among rationales for membership exemption not specifically enumerated by the Eighth Circuit[26] is the fact that members are reasonably assumed to have control over solicitation of contributions from themselves and expenditure of the funds they contribute. Also, members of organizations have greater access to financial information as a matter of Minnesota law. A provision of the Minnesota Non-profit Corporation Act, under which most charitable entities are organized, specifically provides a member of a non-profit corporation the right to inspect the books and records of the organization. Minn. Stat. § 317.28 (1980).[27]

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[26] "The exemption provision of the Act, section 309.515, without considering the detailed classifications, also appears generally to serve the valid purpose of freeing from regulation certain organizations for which public disclosure of funding would not significantly enhance the availability of information to contributors . . . The safeguards attending membership funding have been mentioned . . . ." J.A. 138. Earlier the court stated: "Membership funding may have built-in safeguards and opportunities for informing contributors whereas solicitation from the public, lacking such safeguards, arguably needs greater public disclosure." J.A. 134. See also, *National Foundation v. City of Fort Worth*, 415 F.2d 41 (5th Cir. 1969) *cert. denied*, 396 U.S. 1040 (1970).

[27] Minn. Stat. § 317.28, subds. 2, 3 provide:

> (2) A member, his agent or his attorney, may inspect all books and records for any proper purpose at any reasonable time.
>
> (3) Upon request by a member, the domestic corporation shall furnish the member with a statement showing the financial result of all operations and transactions affecting income and surplus during its last annual accounting period and a balance sheet containing a summary of its assets and liabilities as of the closing date of such accounting period.

A similar provision of a state non-profit corporation law has been held valid and enforceable by a member even against a religious corporation. See *Bourgeois v. Landrum*, 396 So.2d 1275 (La. 1981).

Where the safeguards of membership funding do not exist, the need for public disclosure is obvious. The general public has no control over solicitations or expenditures, and no familiarity with the organization against which to measure the representations made. The general public has no right of access to the soliciting organization's records and no familiarity with its operations. The state may then require disclosure in furtherance of its interests in preventing deception and improving donor awareness. *Heffron v. International Society for Krishna Consciousness, Inc.*, 49 U.S.L.W. 4762 (June 22, 1981) (Brennan, J., concurring in part, dissenting in part).

This rationale does not evaporate in the context of religious organizations. The state's interests are the same. As public contributions increase as a percentage of total contributions, the need for public disclosure increases. Conversely, as membership donations increase, the need for public disclosure decreases. The particular point at which public disclosure should be required (i.e., the particular dividing line in the exemption in question) is a determination for the legislature. In this case, the Act's "majority" distinction is a compelling point, since it is at this point that the organization becomes predominantly public-funded.[28]

The appellate court suggested that the exemption might have been constitutional had the Minnesota legislature applied the member-donor criterion in the same way to religious organizations as it did to the fraternal, benevolent, professional organizations (i.e., exemption if *all* contributions are from the membership). J.A. 134. This suggestion only highlights the inconsistency in the court's reasoning.

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[28] Two natural places to weigh in the balance of competing factors are exemptions for complete membership funding and exemption for majority membership funding, the two places the Minnesota legislature chose to make the distinctions. Minn. Stat. § 309.515 1(b), (d).

If religious organizations soliciting all contributions from their membership had been exempted, there would still have been two classes of religious organizations, exempt and non-exempt. Thus, the court's posited exemption would be subject to the same speculation concerning probable legislative motivation and differential treatment of religious organizations as was the provision authored by the Minnesota legislature. Analytically, the challenged exemption and the exemption authored by the court are identical. To the extent the court considered the posited exemption consistent with the establishment clause, it should have found the challenged exemption constitutional as well.

Similarly, the result ordered by the court, a total religious exemption, clearly prefers religious to non-religious charitable organizations and is indeed a line drawn solely on religious grounds. It is this distinction and not that of the Minnesota legislature that is not secularly based. Thus, although the alternative may have been acceptable if authored by the Minnesota legislature, *Walz v. Tax Commission*, 397 U.S. 664 (1970), the religious basis of such an exemption in the circuit court's remedy is less acceptable than is the exemption at hand. *Everson v. Board of Education*, 330 U.S. 1 (1947). Obviously, if a total exemption based upon religious grounds is permissible, then an exemption based upon secular criteria must be constitutional as well.

## III. THE COURT BELOW ERRED IN INVALIDATING THE CHALLENGED EXEMPTION WITHOUT REQUIRING PLAINTIFFS TO DEMONSTRATE THAT THEY WERE INJURED IN FACT.

The Eighth Circuit Court of Appeals held that plaintiffs had not demonstrated that they were a religious organization adversely affected by the challenged exemption. J.A. 145. The court nonetheless held that plaintiffs had standing to bring this challenge under the "overbreadth" doctrine. In so holding, the circuit court relied upon *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620 (1980). Although the *Schaumburg* case is similar to the present case in that they are both concerned with state regulation of charitable fund raising, the cases are dissimilar on the point for which *Schaumburg* was cited by the circuit court. There was no establishment clause issue in the *Schaumburg* case and the Court there discussed only free speech principles. The distinction is critical, since "overbreadth," a limited exception to traditional justiciability requirements, has not been extended to establishment clause litigation. *McGowan v. Maryland*, 366 U.S. 420 (1961).

In *McGowan*, this Court held that certain businessmen were allowed standing to attack a Sunday closing law on establishment clause grounds since they were shown to be economically affected by the law. Without this showing of adverse economic impact, standing could not have been maintained. 366 U.S. at 429-30. Thus, the *McGowan* plaintiffs were not permitted to challenge the statute on free exercise grounds since they had not alleged their beliefs to be infringed. This Court stated: "Those persons whose religious rights are allegedly impaired by the statutes are not without effective ways to assert these rights." 366 U.S. at 430. The same circumstance exists here.

Apparently recognizing this, plaintiffs, in their Motion to Affirm, abandoned the rationale employed by the appellate court and did not argue that the overbreadth doctrine was appropriate to the establishment clause challenge. See Motion to Affirm at 9-11. This is so because the overbreadth exception in free speech cases which allows a party to assert injury to persons not before the court is based upon the chilling effect that an overly broad statute may have in discouraging what are constitutionally protected activities.

Speech rights of others may be asserted because "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Such inhibition on speech activity has been seen as the direct antithesis of the first amendment. *See, e.g., Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Near v. Minnesota*, 283 U.S. 697 (1931). Even so, the doctrine has been employed "only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. at 613.

No such chilling effect rationale is appropriate in establishment clause cases since it is the effect of the legislation upon the allegedly established religion that is being adjudicated. Speech rights and the policies limiting restraints and inhibitions on speech are not at issue.

More fundamentally, overbreadth is not a complete substitute for injury in fact. Plaintiffs must show they suffer injury from the challenged statute. *Warth v. Seldin*, 422 U.S. 490 (1975); see also *Citizens Concerned for Separation of Church and State v. City and County of Denver*, 628 F.2d 1289 (10th Cir. 1980), *writ of prohibition granted sub nom. City and County of Denver v. Matsch*, 635 F.2d 804 (10th Cir. 1980) *cert. denied*, 49 U.S.L.W. 3949 (June 22, 1981). "Overbreadth"

plaintiffs are not excused from the requirement. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620 (1980).

This Court has emphasized that the standing requirement is one involving the parties seeking to raise issues, and not the issues themselves. *Flast v. Cohen*, 392 U.S. 83, 100-02 (1968). Whether the plaintiffs have been injured by the law in question is the essential inquiry:

> In sum, when a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III. limitation.

*Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976) (footnote omitted). The focus on the plaintiff and not the claim has been developed in a long line of cases:

> The essence of the standing question, in its constitutional dimension, is "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' [as] to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."

*Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 260-61 (1977), *quoting Warth v. Seldin*, 422 U.S. 490, 498-99 (1975), *quoting Baker v. Carr*, 369 U.S. 186, 204 (1962) (emphasis in original of *Warth v. Seldin*).

In this case, the question at issue is the constitutionality of the exemption provision. The standing inquiry must then focus

on whether plaintiffs are adversely affected by this provision. Since the exemption provision adversely affects only those organizations which are religious organizations and which solicit the majority of their money from the general public, it is only those organizations which could have such a personal stake in the outcome of the case so as to satisfy the standing requirement. Plaintiffs therefore cannot challenge the law without demonstrating that they are a religious organization. Since plaintiffs, as was found by the court below, have not demonstrated that they are a religious organization, they necessarily lack standing.

Finally, plaintiffs do not have standing under the taxpayer analysis present in some establishment clause challenges. First, plaintiffs have not alleged taxpayer status. Second, this matter does not involve an allegation of improper expenditure of state funds for religious purposes. It therefore lacks the necessary nexus between tax expenditures and religious establishment upon which the taxpayer standing cases rely. See *Flast v. Cohen*, 392 U.S. 83 (1968).

In short, plaintiffs have shown no personal stake in the litigation. If plaintiffs have standing here, any party has standing to bring any constitutional challenge. The latter proposition has been rejected by this Court and should not be resurrected. *Schlessinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *Warth v. Seldin*, 422 U.S. 490 (1975); *Flast v. Cohen*, 392 U.S. 83, 129, n.18 (Harlan, J., dissenting). Plaintiffs' establishment clause claim should be dismissed.

## CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Eighth Circuit should be reversed.

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